United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 3, 1997 Decided October 28, 1997

No. 96-7215

HARTFORD ACCIDENT & INDEMNITY COMPANY,

APPELLANT/CROSS-APPELLEE

v.

PRO-FOOTBALL, INC., D/B/A
WASHINGTON REDSKINS,

APPELLEE/CROSS-APPELLANT

Consolidated with
No. 96-7222

Appeals from the United States District Court
for the District of Columbia
(No. 94cv02266)

Mark E. Solomons argued the cause for appellant/cross-appellee. With him on the brief was *Michael R. Goodstein*. *Paul H. Friedman* entered an appearance.

Barry W. Levine argued the cause for appellee/cross-appellant. With him on the brief was *Mark A. Packman.*

Before: WALD, WILLIAMS and GINSBURG, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* WILLIAMS.

Concurring opinion filed by *Circuit Judge* WALD.

WILLIAMS, *Circuit Judge*: This case deals with a so-called "retrospective rating" insurance policy, evidently a type common for workers' compensation. The insured employer pays an estimated premium, which is typically based on data about the insured's payroll and the classifications of its employees for risk purposes, and which is subject to later correction. The classifications of course vary radically by activity; here, for example, the initial rate per $100 of payroll for "athletic team or park--contact sports"--the policy was issued to the owner of the Washington Redskins--was nearly 40 times the premium for "clerical office employees." The rates, fixed by law, also vary markedly according to the jurisdiction where employees may routinely seek compensation, depending on benefit levels and likelihood of recovery in the jurisdiction. They are, for example, far higher in the District of Columbia than in Virginia--more than double in this case. Both jurisdictions allow recovery by an employee who is injured within their respective borders or whose employment is principally located there.

The policy calls for initial payment of an estimated premium, to be followed by adjustments to reflect actual circumstances. Here, during the third of three successive one-year policies, the District of Columbia Court of Appeals affirmed the decision of the D.C. Department of Employment Services that the players performed "the

principal services for which they were hired" in the District, where they played their home games (R.F.K. Stadium), rather than in Redskins Park in Virginia, where they spend a majority of their time at practice. *Pro-Football, Inc. v. D.C. Department of Employment Services,* 588 A.2d 275 (D.C. 1991) (*"Anderson"*--so-called after one of the player claimants). The players were thus entitled to invoke D.C. law as a basis for recovery for injuries occurring anywhere (as the players had sought throughout the period of the three policies).

The parties agree that the provisions on premium adjustment allow the insurer to make a retrospective premium change to reflect changes in the employer's payroll or in the job classifications of particular employees. The question is whether the terms of the policy also permit a premium adjustment for a change in the jurisdiction whose law is available to employees, such as resulted from the *Anderson* decision. The district court read the policy as denying the insurer such a power. We reverse.

* * *

Hartford Accident and Indemnity Company provided the Washington Redskins' owner/operator, Pro-Football, Inc. ("PFI"), with a workers' compensation insurance policy for three successive annual policy periods, from July 14, 1988 to July 14, 1991. The policy was a standard form, assigned risk policy administered by the National Council on Compensation Insurance ("NCCI"), designed for employers like PFI who cannot purchase coverage on the voluntary workers' compensation market and who cannot or are not willing to self-insure. See generally 9 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* §§ 92.53-92.65 (1997) (describing assigned risk, retrospective rating policies).

Under the policy, PFI's premiums were initially based on the parties' use of Virginia as the expressly assumed principal location of the players' services.

Under both the District of Columbia and the Virginia workers' compensation insurance plans ("WCIPs"), the NCCI directs insurers in the state pool to issue coverage to employers eligible for assigned risk insurance. When PFI submitted an application for Virginia assigned risk coverage, NCCI assigned the application to Hartford, which was obligated to issue a policy. The policy issued by Hartford consisted of manuals (by reference), standard forms, an Information Page (actually several pages) of figures specific to PFI, and rates; the forms and manuals were approved, and the rates set, by NCCI. (The policy forms for the District and Virginia WCIPs are identical in all material respects.) The terms and rates for the policy were not negotiated; neither Hartford nor PFI could legally have altered them.

Retrospective rating plans of the sort embodied in this policy are used when the size of the insured's risks is difficult to measure at the beginning of the policy period, see Lee R. Russ & Thomas F. Segalla, 5 *Couch on Insurance* § 69.15 (3d ed. 1996) (*"Couch"*). Courts routinely enforce the retrospective provisions in such plans. See, e.g., *L.C. Worley v. Travelers Indemnity Co.*, 183 S.E.2d 91 (Ga. Ct. App. 1971); *Great American Ins. Co. v. Nova-Frost, Inc.*, 362 N.W.2d 358 (Minn. Ct. App. 1985); *Texas Soap Mfg. Co. v. American Auto. Ins. Co.*, 227 S.W.2d 376 (Tex. Civ. App. 1950). Workers' compensation in general, and professional football in particular, present the kind of uncertainty that makes retrospective rating appropriate, because the insured's activities and the size of its payroll are likely to vary considerably over the course of the policy term.

Premiums under the policy are calculated as the product of the work classification rate for a specific jurisdiction and the amount of payroll allocated to employees in that classification and jurisdiction (the "premium basis") up to a regulated maximum amount. Initial premiums (at least for years other than the first one) also incorporate an "experience modification factor" (or "mod"), a prospective adjustment to take account of prior years' claims experience for the particular employer. All the factors other than actual payroll -- the rates, class ifications, premium basis maxima, and mod--are set by NCCI.

Following attempts by several injured Redskin players to collect the higher District benefits for injuries received outside the District, the Director of the District of Columbia Department of Employment Services ruled on or about July 10, 1989, just before the end of the first policy year, that the players' place of principal employment was the District rather than Virginia. The D.C. Court of Appeals issued its decision in *Anderson*, affirming the Director, in March 1991.

Hartford, relying upon the policy provision that allowed calculation of the "final premium" after the policy's expiration, then wrote PFI that it had reclassified Redskin players and coaches as District of Columbia employees for all three policy years. For the then-current policy year, 1990-91, Hartford issued an endorsement, or formal amendment, implementing the reclassification. Hartford then billed PFI for the difference in premium levels--a difference, after adjustments, of $5,350,762. PFI refused to pay, and Hartford filed suit under the federal courts' diversity jurisdiction. PFI counterclaimed for breach of contract and fiduciary duty, fraud, bad faith, and negligent misrepresentation.

On cross-motions for summary judgment the district court granted summary judgment for PFI, ruling that the policy did not permit Hartford to change the jurisdictional basis of the premium calculation retroactively. *Hartford Accident & Indemnity Co. v. Pro-Football, Inc., d/b/a The Washington Redskins*, No. 94-2266 (D.D.C. Aug. 21, 1996) ("Mem. Op."). The district court also suggested that any reclassification might have to be by formal endorsement, which Hartford had failed to issue except for the final policy year at issue. Finally, the district court struck the affidavit of a Hartford expert because it was submitted after the close of discovery, and rejected PFI's counterclaims as time-barred under the District's statute of limitations. All of these decisions are on appeal.

I.

The district court noted, and the parties agree, that the task in contract interpretation is to decide "what a reasonable person in the position of the parties would believe the language meant." Mem. Op. at 8 (citing *1010 Potomac Assoc. v. Grocery Mfrs. of America, Inc.*, 485 A.2d 199, 205 (D.C. 1984)). In the particular context of insurance, under District of Columbia law,

> [s]ince insurance contracts are written exclusively by insurers, courts generally interpret any ambiguous provisions in a manner consistent with the reasonable expectations of the purchaser of the policy. However, when such contracts are clear and unambiguous, they will be enforced by the courts as written, so long as they do not 'violate a statute or public policy.'

Smalls v. State Farm Mut. Auto. Ins. Co., 678 A.2d 32, 35 (D.C. 1996) (citations omitted). See also *GEICO v. Fetisoff*, 958 F.2d 1137, 1141 (D.C. Cir. 1992) ("Under District of Columbia law, '[c]lear and unambiguous language [in an insurance policy] should be construed according to its everyday meaning.'") (quoting *Continental Casualty Co. v. Cole*, 809 F.2d 891, 896 (D.C. Cir. 1987)). Thus, as we understand District law, no preference for the insured's reading arises unless the contract is ambiguous, and even then the preference involves no more than accepting what the insured might reasonably believe over an alternative reasonable interpretation offered by the insurer.

The parties also wrestle with the issue of whether the special status of this insurance contract--imposed on the parties as NCCI's standard form--calls for any modification of the standard rule for interpreting insurance contracts. Commentators have urged, and many (perhaps most) jurisdictions have agreed, that since the basis for the standard rule--the insurer drafted the contract without negotiating it with the insured--is absent, the presumption in favor of the insured's reasonable interpretation should be relaxed: "The rule of construction against the insurer does not apply where . . . the language was prescribed by statute and controlled by Division of Insurance rather than the individual insurer." 2 *Couch* § 22:15. See also John A. Appleman & Jean Appleman, 13 *Appleman Ins. L. & P.* § 7407 (1981) ("While North Carolina and a few other states still apply the doctrine of construing policies against the insurer to instances of standard policies, the better authority is to the effect that the doctrine of liberal construction has no place under those circumstances.").[1]

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[1]Accord, e.g., *Kisting v. Westchester Fire Ins. Co.*, 290 F.Supp. 141, 147 (D.C. W.D. Wis. 1968), aff'd, 416 F.2d 967 (6th Cir. 1969)

There appears to be no District of Columbia precedent on the construction of state-mandated policy language or forms. In any event, because we do not find the language ambiguous, or as reasonably permitting PFI's proposed interpretation, we need not resolve that contest.

We now turn to interpreting the policy itself. (The text of the key printed provisions of the policy--the "boilerplate"--is set forth in the Appendix.)

Did the Final Premium Clause entitle Hartford to adjust the premium for jurisdictional change?

The Final Premium Clause explicitly describes the premium shown on the Information Page as "an estimate" and states that the "final premium will be determined after this policy ends by using the actual, not the estimated, premium basis and the proper classification and rates that lawfully apply to the business and work covered by this policy." Hartford's decision to charge District rates for the players and coaches in 1991 in the wake of *Anderson* tracks these terms. Thereafter, only the D.C. classifications and rates would qualify as the "proper classification and rates that lawfully apply" to the affected employees. The logic of any insurance policy, prospective or retrospective, requires premium levels to track expected benefits.[2] A retrospective-rating policy allows post-signature events to affect both sides of the balance. Here Hartford accounted for a large, legally mandated, rise in benefit levels through

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(applying Wisconsin law); *Hankins v. Public Service Mut. Ins. Co.*, 63 A.2d 606 (Md. 1949); *Charles Dowd Box Co. v. Firemen's Fund Ins. Co.*, 351 Mass. 113, 218 N.E.2d 64 (1966); *Del Guidici v. Importers' & Exporters' Ins. Co.*, 120 A. 5 (N.J. 1923).

[2]As used here, "expected" refers to the average of possible outcomes, each specific outcome discounted for its probability.

an appropriate adjustment to its premium calculation, as the policy contemplated.

The district court came to a contrary conclusion--here urged on us by PFI--by treating the Final Premium Clause as limited by the Classifications Clause. It read the latter as contemplating only changes to business and work classifications (and the rate and premium basis changes that follow a classification change). It then read the Final Premium Clause as permitting Hartford to make only two types of independent changes to the policy factors: changes to premium basis (payroll) determined under the Audit Clause, and changes to work classifications determined under the Classifications Clause; rate adjustments would be restricted to the consequences of changes in these two types of factors. Mem. Op. at 9-11. This interpretation left no room in the Final Premium Clause for a change in rates corresponding to a change in the workers' jurisdictional basis, whether the change arose from an exogenous legal event such as the *Anderson* decision, or from changes in actual work location (or new information about work location) such as might be revealed during the audit process.

This reading sacrifices the fundamental principles of the policy to symmetry--and a false symmetry at that. The Final Premium Clause calls comprehensively for retrospective adjustment of the premium to conform to "the actual . . . premium basis and the proper classification and rates that lawfully apply." Here the D.C. Court of Appeals reached a conclusive (and retroactive) determination that the jurisdictional predicate of the players' benefit eligibility was not, in fact, Virginia, but rather the District of Columbia. Hartford correctly concluded that the change in the jurisdictional predicate for benefits entailed a matching change in the "actual"

rates. PFI's reading, by contrast, rewrites the phrase "proper classification and rates" to eliminate any independent meaning for "rates."

We see no basis for the assumption that the Audit Clause--authorizing inspection of the insured's books for up to three years after the policy period for information to "be used to determine final premium"--must refer solely to changes in premium basis (i.e., payroll limited by the NCCI-imposed maxima). Mem. Op. at 10. An audit might reveal, as Hartford's apparently did, see Appendix for PFI on Cross-Appeal at 106, that all claims by players are being filed in another jurisdiction. Since it is the function of the Audit Clause to gather data for the correct calculation of the premium, it would be arbitrary to perform the final premium calculation in disregard of a highly relevant fact so gathered, simply because the scope of the Classifications Clause is limited to changes in classifications.

In fact, the Information Page states, "All information required below is subject to verification and change by audit." The information set forth "below" included rates calculated for various job classifications on a jurisdiction-specific basis, so that the natural, indeed inescapable, reading is that the provision for change applies to the jurisdictional as well as the other aspects of the premium calculation. By contrast, on a narrow reading of the Audit Clause's scope, it remains mysterious how information relevant to the Classifications Clause will be gathered except through the insured's goodfaith disclosure. But under a harmonious reading of the three clauses, the Audit Clause has potential to generate data for all aspects of the Final Premium calculation, as well as for reclassifications under the Classifications Clause.

Granted, our construction of these clauses makes partially redundant the separate clause governing ordinary, nonjurisdictional, changes to work classifications. Why should such changes be addressed not only in the Audit and Final Premium Clauses, but also in a special clause of their own, the Classifications Clause? One plausible answer is that changes sought by the insurer to work classifications may be likely to engender the greatest resistance by the insured, and may be the most disputable, so the function of the special Classifications Clause is just to underscore the insurer's power to make those changes. In any event, PFI's reading of the clause to suggest that it puts jurisdictional changes entirely off the map presents a far greater anomaly, for under PFI's reading the insurer would be unable to adjust for a change in one of the most significant elements in its exposure.

PFI appears to believe that somewhere in the policy Hartford promised that the rates for players would be calculated on the assumption that Virginia was their principal place of employment, regardless of whatever might prove the case. It is not clear just where PFI finds any such promise. One possibility is the page of the Information Page that covers the players (as well as the clerical staff working at Herndon and the athletic team operational staff), which says, as a heading: "Named Insured and Location Address of Operations Covered by this Schedule," together with the address of the Herndon facility. (A similar page covers those understood to be working in the District.)

Far from representing any promise, however, the heading appears to be no more than a device for organizing information, framing the then-estimated classifications, rates and payroll for the workers thought to be located at the places shown on the particular pages.

Furthermore, as Hartford rightly points out, PFI's restrictive reading would illogically bind the insurer to the insured's declaration of address despite misrepresentation, a simple out-of-state move during the policy year, or an honest error. PFI offers no construction of the policy that applies the retroactive adjustment clause to any of those scenarios. Nor does it explain why the parties would limit the insurer to such alternative remedies as a fraud claim (which would encompass only some misrepresentation cases) or a rise in the mod (which would be prospective only).

Courts in other jurisdictions, faced with similar or identical policy language, have held that the retrospective rate-changing power encompassed erroneous jurisdictional assignments. In *D.A.X., Inc. v. Employers Ins. of Wausau*, 659 N.E.2d 1150 (Ind. Ct. App. 1996), the insurer discovered that the policy's jurisdictional assumption was wrong. The insured, an employee-leasing company, had declared that its operations were entirely in Indiana, because of its office location. Because the insurer found that claims were being filed in Illinois, it launched an audit under the standard Audit Clause, concluded that under rules promulgated by NCCI the correct site was Illinois, and accordingly adjusted the premium. The trial court enforced the insurer's claim to the higher premium. On appeal the insured claimed that the trial court judgment had wrought an unconstitutional "impairment" of contract and an unjustified contract reformation. The appellate court rejected both theories, finding that the trial court "simply enforced the contract the way it was written." *Id.* at 1156. The court read the Final Premium Clause (identical to the clause at issue here) as permitting the insurer to use the "rates and classifications from such other

states as may lawfully apply," which, given the NCCI rating rule, meant the Illinois rates. *Id.* at 1157.

And in a New Hampshire case also involving a retrospective rating policy, with language similar though not identical to ours, the insurer discovered during its post-policy audit that many of the insured's employees, classified as working in New Hampshire, had in fact been working in Massachusetts, and accordingly recalculated the premium. *Continental Ins. Co. v. Seppala & Aho Constr. Co., Inc.,* 430 A.2d 157 (N.H. 1981). A clause--the counterpart of our Final Premium Clause--stated that "the earned premium," as opposed to the initial "estimated premium," "shall be computed in accordance with the rule, rates, rating plans, premiums and minimum premiums applicable to this insurance." *Id.* at 158. The court held that this clause clearly and unambiguously gave the insurer the power to re-rate the policy with a corrected jurisdictional classification--indeed, to the point of making clear that the insurer's agent had no authority to represent that only New Hampshire rates would be charged. *Id.* at 159. We agree with these decisions.

Must Hartford's power to correct the premium be exercised through an endorsement?

There are two provisions that might give rise to an obligation by Hartford to exercise its premium-revising power by means of an endorsement. First, PFI relies on Subsection A of the "General Section," which provides that the "terms of this policy may not be changed or waived except by endorsement issued by us to be part of this policy."

But we do not see the insurer's exercise of the power expressly granted by the Final Premium Clause as the "change" of a term of the Policy: it is an *exercise* of a

power that a specific policy term--the Final Premium Clause--expressly grants the insurer to use "the ***actual, not the estimated***, premium basis and the proper classification and rates that lawfully apply to the business and work covered by this policy" (emphasis added). That, of course, was the view of the courts in *D.A.X.* and *Continental Insurance*. Moreover, the Final Premium Clause expressly says that the final premium "will be determined after this policy ends." It seems odd to say that an activity explicitly slated to occur after the policy "ends" constitutes a "change" of the then-expired policy's terms. (PFI's theory, incidentally, further entails--implausibly, given the Audit Clause--that application of the Final Premium Clause to correct premium basis would also require an endorsement.) Because PFI's reading of Subsection A fails to accord independent force to the Final Premium Clause, it fails to give "a reasonable, lawful, and effective meaning to all [the policy's] terms." *1010 Potomac Assoc.*, 485 A.2d at 205.

Moreover, PFI offers no rationale whatsoever for applying the General Section endorsement requirement to adjustments under the Final Premium Clause. Hartford, by contrast, suggests that endorsements are issued only during a policy's term, and that the purpose of the requirement is to provide notice to the insured to enable it to decide either to cancel or at least not to renew the policy. We do not feel qualified to embrace that view, but it is, at least, a plausible one.

We can imagine two ways that a post-expiration endorsement requirement might possibly have some purpose beyond that contributed by the final billing itself.[3]

[3]Although these arguments were not advanced by either party, we raise them ourselves in order to test whether our own reading of the contract is indeed the only reasonable construction of its terms.

First, an endorsement requirement might make it easier for insurance regulators to monitor assigned risk policies in their jurisdictions, as is apparently the regulators' charge under the D.C. WCIP. See D.C. WCIP at 9 ("The Plan Administrator shall monitor and review servicing carrier performance by . . . (3) conducting on-site audits; and (4) reviewing any other information that relates to the servicing carrier."). Both D.C. and Virginia require that copies of the policy declarations "and all endorsements" must be filed with the appropriate administrator, see D.C. WCIP at 7, Virginia WCIP at 2.

But if regulators want information on ultimate premiums paid, a requirement of endorsements for jurisdictional changes under the Final Premium Clause is a strangely incomplete solution. We know that the final bill will reflect changes to estimated payroll, but even PFI does not contend that a post-expiration, ordinary correction of the payroll constitutes a "change" to the policy, such as to warrant formal endorsement. Either the regulators do not depend on a formal endorsement process for their information-gathering needs, or they don't monitor the policies as closely as this suggestion assumes.

A second possible justification for requiring post-policy jurisdictional adjustments to take the form of endorsements might look to the interests of employee-claimants. *If* the jurisdictional possibilities open to claimants were governed by the insurance contract, specification of jurisdictional change in an endorsement might make it easier for claimants to ascertain their appropriate jurisdictional bases. Of course, the premise is faulty. Claimants' jurisdictional options depend on state law, as *Anderson* shows, not on arrangements between the employer and its insurer.

Thus an endorsement attached to a final premium billing, issued after the expiration of a policy, would perform no notice function beyond that of the billing itself. It would be a purely formal gesture.

Unsurprisingly, PFI has shown no reason to think that it was harmed by Hartford's non-issuance of an endorsement when it made its final billing for the expired terms.[4] By contrast, Hartford's behavior in issuing an endorsement only to the current 1990-91 policy year is consistent with the rationale for the requirement: it provided PFI with notice in case it should wish to find other insurance or self-insure in the future (as apparently it chose to do).

An alternative source of an endorsement requirement would be the Classifications Clause's statement that if exposures are different from those described by the estimated classifications, "we will assign proper classifications, rates and premium basis *by endorsement to this policy*" (emphasis added). Since PFI's position rests heavily on a notion that the Classifications Clause does not cover jurisdictional change, and Hartford agrees on that point, it seems plain that it cannot be a source of any endorsement obligation that would be applicable here.

Accordingly, we reverse the grant of summary judgment in favor of PFI and remand for the district court to enter summary judgment for Hartford.

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[4]PFI does claim that it was injured by Hartford's not having issued an endorsement immediately after the Director's initial adverse *Anderson* decision and instead waiting until the D.C. Court of Appeals ruling to change the policy rates. Whatever the merits of this defense, it depends entirely on the *timing*, not the *form*, of Hartford's action and was not the basis of the district court's ruling.

II.

The district court rejected PFI's counterclaims as time-barred by the District of Columbia statute of limitations. Since PFI's claims arise under District law, the applicable statute of limitations is also that of the District. See *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945); *Kuwait Airways Corp. v. American Security Bank, N.A.*, 890 F.2d 456, 460 (D.C. Cir. 1989). This is true even though Rule 12(a)(4) of the Federal Rules of Civil Procedure extends the time for a responsive pleading to ten days after the denial of a motion under Rule 12, and PFI advanced its counterclaim in an answer timely filed under that rule. See 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* 1419 (2d ed. 1990, Supp. 1997).

An agreement between the parties tolled the statute until October 22, 1994; PFI's answer and counterclaim were filed a year later. But Hartford filed its complaint on October 20, 1994, and defendant argues that this further tolled the statute. While there is considerable law (and sensible policy) on PFI's side, the controlling law--that of the District--is against it.

In *Sears, Roebuck and Co. v. Goudie*, 290 A.2d 826 (D.C. 1972), the court considered whether a counterclaim filed too late (assuming no tolling) could be saved by the doctrine of relation back to a prior, timely counterclaim that had been dismissed on substantive grounds. The court found no relation back because the new counterclaim was insufficiently related to the dismissed one. *Id.* at 830. A necessary premise of the entire discussion was that the filing of the complaint did *not* toll the statute on the counterclaim. And the court made this premise specific, saying that a genuine counterclaim, i.e.,

one going "beyond matters of defense" such as recoupment, "must be viewed as an affirmative cause of action and *should therefore be tested apart from the primary claim in determining whether the statute of limitations would bar the counterclaim." Id.* (emphasis added). This superseded the contrary, more lenient, rule of *De Vito v. Hoffman,* 199 F.2d 468 (D.C. Cir. 1952). Because PFI's counterclaims concededly go "beyond matters of defense," they must be assessed separately, and thus fail.

III.

In the course of its ruling on the cross motions for summary judgment, the court held that the parties' failure to observe discovery rules--specifically failure to request extension of a discovery deadline--barred use of experts' affidavits submitted to bear upon the construction of the policy. Mem. Op. at 12 n.10. Hartford contests the exclusion of its expert's affidavit.

Hartford's contention appears moot--at least in the sense that, as we have construed the portions of the policy relevant to this appeal without consideration of any extrinsic evidence, such evidence can make no contribution to resolution of the case. Hartford suggests, however, that we should address the court's discovery ruling because, even if it wins on the basic issue of its power to adjust the premium by reference to jurisdictional mistake, as it has, "[d]amages would still need to be addressed."

At the time the district court exercised its discretion in ruling on this discovery issue it was simultaneously making summary judgment rulings that brought the case to a complete end (subject, of course, to appellate review). We do not know if that circumstance colored the court's ruling on the issue. Rather than entangle ourselves in what is surely a messy issue, and perhaps a completely

unnecessary one, we simply note that *if* indeed there are remaining factual issues to be resolved on remand, the court may wish to re-examine its discovery ruling.

* * *

Accordingly, the judgment of the district court is reversed in part and affirmed in part, as stated above.

So ordered.

General Section

A. The Policy

This policy includes at its effective date the Information Page and all endorsements and schedules listed there . . . . The only agreements relating to this insurance are stated in this policy. The terms of this policy may not be changed or waived except by endorsement issued by us to be part of this policy.

Part Five--Premium

A. Our Manuals

All premium for this policy will be determined by our manual of rules, rates, rating plans and classification. We may change our manuals and apply the changes to this policy if authorized by law or a governmental agency regulating this insurance.

B. Classifications

Item 4 of the Information Page shows the rate and premium basis for certain business or work classifications. These classifications were assigned based on an estimate of the exposures you would have during the policy period. If your actual exposures are not properly described by those classifications, we will assign proper classifications, rates and premium basis by endorsement to this policy.

C. Remuneration

Premium for each work classification is determined by multiplying a rate times a premium basis . . . .

E. Final Premium

The Premium shown on the Information Page, schedules, and endorsements is an estimate. The final premium will be determined after this policy ends by using the actual, not the estimated, premium basis and the proper classification and rates that lawfully apply to the business and work covered by this policy. If the final premium is more than the premium you paid to us, you must pay us the balance . . . .

G. Audit

You will let us examine and audit all your records that relate to this policy. These records include ledgers, journals, registers, vouchers, contracts, tax reports, payroll and disbursement records, and programs for storing and retrieving data. We may conduct the audits during regular business hours during the policy period and within three years after the policy period ends. Information developed by audit will be used to determine final premium . . . .

WALD, *Circuit Judge, concurring*: I differ with the reasoning of the majority on only one aspect of this case, the issue of whether the Final Premium Clause should be read to permit Hartford to change the jurisdictional basis of closed policies without issuing an endorsement.

I find the evidence on which the majority relies on this issue--policy language, caselaw, and the purported lack of any reason for requiring endorsements to closed policies--unconvincing. The language of the Final Premium Clause seems to me to be ambiguous. It could be read to provide the insurer with only a substantive *right* to adjust the terms of a closed policy, or it could also furnish a specific *procedure* for doing so, and so excuse compliance with the General Section's endorsement requirement. As for the cases cited by the majority, *D.A.X., Inc. v. Employers Ins. of Wausau*, 659 N.E.2d 1150 (Ind. Ct. App. 1996) and *Continental Ins. Co. v. Seppala & Aho Constr. Co.*, 430 A.2d 157 (N.H. 1981), in neither of them does it appear that any party raised the question of whether an endorsement was required to effect a change in policy terms. (Indeed, the policies involved may not have even contained an endorsement requirement like the one here.) Nor do I agree with the majority's conjecture that requiring endorsements to closed policies would be a "purely formal gesture." Majority opinion at 13. Formality can, at times, be very useful. The record now before us contains little evidence about the practices of the insurance industry or the usual behavior of regulators, and the parties did not argue this issue in any detail. We simply cannot be certain that insurers, insureds, and third parties would have no use for endorsements to closed policies.

Ultimately what I find dispositive in this case is that the parties' course of performance under the policy

indicates that they appeared to have implicitly agreed that the Final Premium Clause permitted changes in policy terms without an endorsement. "[E]vidence of circumstances surrounding the contract formation *and the parties' conduct in performing it* is relevant to ascertaining their intent." *Dano Resource Recovery, Inc. v. District of Columbia*, 620 A.2d 1346, 1653 (D.C. 1993) (emphasis added). In October 1989, after the 1988-89 policy had closed, Hartford audited that policy year and issued a "Statement of Premium Adjustment," presumably under the Final Premium Clause, which set forth revised figures for PFI's payroll and associated adjustments to the policy premium. No corresponding endorsement is appended to the copy of the 1988-89 policy that appears in the record. I find this to be strong enough evidence that the parties read the Final Premium Clause as providing both a substantive right to change policy terms and a procedure for effecting such changes to concur with the result reached by the panel.[1]

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[1]I agree with the panel majority that we need not decide whether the doctrine that ambiguities in a contract are construed against its drafter applies in this case. In discussing this issue in dicta, however, the majority observes that it is unclear how District of Columbia law would treat state-mandated policy language. In fact, NCCI, the entity that drafted the policy language, appears to be dominated by the insurance industry. *See* William Hager, *Data Value Depends on Accuracy, Not 'Independence'*, NAT'L UNDERWRITER PROP. & CAS. RISK & BENEFIT MGMT., Dec. 13, 1993 (stating that, of twenty-one seats on NCCI's board of directors, all but four are occupied by insurance industry representatives). The question, therefore, might be better framed as how District of Columbia law would treat a policy whose use is mandated by law, but which was ultimately drafted by an entity with interests closely aligned with those of the insurer.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HARTFORD ACCIDENT AND INDEMNITY COMPANY,

Plaintiff,

v.

PRO-FOOTBALL, INC., d/b/a THE WASHINGTON REDSKINS,

Defendant.

Civil Action
No. 94-2266 (JHG)

FILED
AUG 21 1996
Nancy Mayer-Whittington, Clerk
U.S. District Court

JUDGMENT

In accordance with the Memorandum Opinion and Order issued this date, judgment is hereby entered against plaintiff, Hartford Accident and Indemnity Company, and in favor of defendant, Pro-Football, Inc. on the complaint.

IT IS SO ORDERED.

August 21, 1996

Joyce Hens Green /s/
JOYCE HENS GREEN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HARTFORD ACCIDENT AND INDEMNITY COMPANY,

Plaintiff,

v.

PRO-FOOTBALL, INC., d/b/a THE WASHINGTON REDSKINS,

Defendant.

Civil Action
No. 94-2266 (JHG)

FILED
AUG 21 1996
Nancy Mayer-Whittington, Clerk
U.S. District Court

MEMORANDUM OPINION AND ORDER

Presently pending are cross motions for summary judgment on the complaint, as well as plaintiff Hartford Accident and Indemnity Company's ("Hartford's") Motion to Dismiss defendant Pro-Football, Inc.'s ("Pro-Football's") counterclaims. For the reasons set forth below, Pro-Football's motion for summary judgment on the complaint is granted, and Hartford's motion for partial summary judgment is denied. Hartford's motion to dismiss Pro-Football's counterclaims is granted.

I. BACKGROUND

From July 14, 1988 through July 14, 1991, Hartford, a national insurance company, provided workers compensation insurance to Pro-Football, which operates

the Washington Redskins professional football team.[1] The insurance was provided through the state of Virginia's workers compensation insurance plan ("WCIP"), which makes insurance arrangements through an "assigned risk pool" for employers who are not commercially insured or self-insured.[2] The Virginia WCIP is administered by the National Council on Compensation Insurance ("NCCI").

Pro-Football applied for insurance through the Virginia WCIP, and represented in its application that most of its employees, including the Redskins football players, were Virginia employees, in that the majority of their time is spent at the Redskins' practice facility in Virginia. NCCI, as administrator of the Virginia WCIP, directed Hartford to issue a workers compensation policy to Pro-Football, which Hartford did effective July 14, 1988.[3] The policy was renewed in the two subsequent years.

Under the WCIP, employers and insurers are obligated to utilize a form policy, which neither party has the authority to modify. The policy is supplemented with

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[1] This background discussion is drawn largely from the parties' Joint Stipulations of Fact.

[2] In order to obtain insurance through the WCIP, an employer must demonstrate that it applied to and was rejected by at least two commercial insurers, which was the case for Pro-Football. Additionally, Pro-Football was not eligible to self-insure because the owner of the Redskins, Jack Kent Cooke, refused to disclose the financial information required to demonstrate his financial ability to guarantee the payment of workers compensation benefits to his employees.

[3] In return for providing workers compensation insurance to employers through the WCIP, insurers receive a fee, which is a percentage of the policy's premiums. The fee percentages are considerably higher in the District of Columbia than in Virginia.

several information pages and endorsements which contain information specific to Pro-Football and its employees. The policy issued to Pro-Football by Hartford groups employees into three separate classifications: 1) contact sports (i.e., football players), (2) operations and drivers, and (3) clerical employees. As noted previously, Pro-Football stated that Redskins players were Virginia employees for purposes of workers compensation. Hartford did not believe such a classification was improper; accordingly, the policy utilized this classification and applied Virginia rates. Subsequent renewal policies issued on July 14, 1989 and July 14, 1990 similarly classified Redskins players and coaches as Virginia employees, and applied Virginia rates. A small number of Pro-Football's clerical employees who work at RFK Memorial Stadium were classified as District of Columbia employees. Accordingly, different rates were utilized in the policy for different groups of employees.[4]

Workers compensation premiums are calculated by multiplying a portion of the employer's payroll, i.e., the "premium basis," by the applicable rates for the particular job classification. The rates vary according to jurisdiction and classification. An insurer providing coverage through the WCIP cannot deviate from the rates and classifications established by a particular jurisdiction. The premium actually paid by Pro-Football was calculated using rates and rating rules established and approved by Virginia (as to contact sports) and the District of Columbia (as to clerical staff).

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[4] Virginia's workers compensation premium rates are lower than the District of Columbia's. Moreover, different rates apply to different work classifications, to account for the varying degrees of risk faced by workers in different jobs.

Premiums can be adjusted during the current policy year through an experience modification factor, which reflects an employer's actual past loss experience. The modifier is computed by NCCI. Thus, generally speaking, if claims and benefit payments exceed the insurer's estimates, the insurer may apply an experience modification factor, if approved by NCCI, and prospectively increase an employer's premiums. Hartford utilized the experience modifier to increase Pro-Football's premiums during the three years the policies were in effect.

Prior to the issuance of the 1988 policy, some Redskins players had asserted claims for workers compensation benefits under the District of Columbia's workers compensation law, which provides more generous benefits than Virginia.[5] Pro-Football and Hartford's predecessor, Fireman's Fund, had challenged such claims. Hartford became aware of the claims during the first policy year, and it too challenged them, along with Pro-Football. However, on or about July 10, 1989, the Director of the District of Columbia's Department of Employment Services ("DOES") ruled that some Redskins players were eligible for District of Columbia workers compensation benefits. Subsequent cases reached the same result. A number of these cases were consolidated for purposes of appeal. In March 1991, the District of Columbia Court of Appeals affirmed the Director's decision that the employment of Redskins players who played at RFK Memorial Stadium was "principally localized" in the District of Columbia, and, as such, these players were entitled to D.C. workers compensation benefits, regardless of where their injuries occurred. Pro-Football, Inc. v.

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[5] Interestingly, each policy contains an "interstate experience modification," which suggests that Hartford took into account the possibility of claims being paid in multiple jurisdictions.

Dep't of Empl. Serv., 588 A.2d 275 (D.C. 1991) (hereafter referred to as the Anderson case).

Subsequently, Hartford notified Pro-Football that in light of the Anderson decision, it was reclassifying Redskin football players and coaches as District of Columbia employees for all three policy years. Hartford billed Pro-Football for the additional premiums which, after adjustments between the parties, amount to $5,350,762 for the three policy years. Hartford also issued an endorsement to the 1990-91 policy which reclassified the players and coaches as District of Columbia employees and applied District of Columbia rates. Pro-Football objected to paying the higher premiums, and Hartford brought this case.

II. ANALYSIS

A. Motions for Summary Judgment

Summary judgment is appropriate when there is "no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "The inquiry performed is the threshold inquiry of determining whether there is a need for trial -- whether, in other words, there are any genuine issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).

In considering a motion for summary judgment, the "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Id. at 255. At the same time, however, Rule 56 places a burden on the nonmoving party to "go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, 'designate specific

facts showing that there is a genuine issue for trial.'" Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).

Hartford seeks summary judgment in its favor, contending that the insurance policy permitted it to reclassify Pro-Football's players and coaches as District of Columbia employees and charge D.C. premiums, and that Pro-Football's refusal to pay the additional premiums constitutes breach of contract. Conversely, Pro-Football contends that the policy does not permit Hartford to change the jurisdictional basis of the premiums, and that Pro-Football should be granted judgment in its favor on Hartford's claims.

The insurance policy, which is identical in all material respects for all the years in question, contains several pertinent provisions. First, the Information Pages attached to the policy repeatedly refer to premiums as "estimated." Item 4 of the Information Pages states that "the premium for this policy will be determined by our manuals of rules, classifications, rates and rating plans. All information required below is subject to verification and change by audit." Additionally, the policies for 1989-90 and 1990-91 state that:

> the premium for the policy will be adjusted by an experience rating modification factor. The factor was not available when the policy was issued. The factor, if any, shown on the information page is an estimate. We will issue an endorsement to show the proper factor, if different from the factor shown, when it is calculated.

The main body of the policy also contains several pertinent provisions. In the "General Section," the policy states that:

> This policy includes at its effective date the Information Page and all endorsements and schedules listed there. . . . The only agreements relating to this insurance are stated in this policy. The terms of this policy may not be changed or waived except by endorsement issued by us to be part of this policy.

Part Five of the policy, which pertains to premiums, contains the following relevant provisions:

> A. Manuals
>
> All premium for this policy will be determined by our manuals of rules, rates, rating plans and classifications. We may change our manuals and apply the changes to this policy if authorized by law or a governmental agency regulating this insurance.
>
> B. Classifications
>
> Item 4 of the Information Page shows the rate and premium basis for certain business or work classifications. These classifications were assigned based on an estimate of the exposures you would have during the policy period. If your actual exposures are not properly described by those classifications, we will assign proper classifications, rates and premium basis by endorsement to this policy.

* * *

E. Final Premium

The premium shown on the Information Page, schedules, and endorsements is an estimate. The final premium will be determined after this policy ends by using the actual, not the estimated, premium basis and the proper classification and rates that lawfully apply to the business and work covered by this policy.

* * *

G. Audit

We may conduct . . . audits during . . . the policy period and within three years after the policy period ends. Information developed by audit will be used to determine final premium.

In interpreting a contract, the Court is to determine what a reasonable person in the position of the parties would believe the language meant. 1010 Potomac Ass'n v. Grocery Mfctr's of America, Inc., 485 A.2d 199, 205 (D.C. 1984). "The writing must be interpreted as a whole, giving a reasonable, lawful, and effective meaning to all its terms." Id. Moreover, "[i]f the document is facially unambiguous, its language should be relied upon as providing the best objective manifestation of the parties' intent." Id. Whether a contract is ambiguous is a question of law for determination by the court. Young v. Delaney, 647 A.2d 784, 791 (D.C. 1994). And, "[o]f course, a contract is not rendered ambiguous merely because the parties thereto do not agree upon its proper construction." Id.

Upon consideration of the language of the insurance policy, together with the parties' stipulations of fact concerning the background and development of the policy, it is evident to the Court that the express language of the policy does not permit Hartford to retroactively change the jurisdictional basis of the policy for Redskins players and coaches. Hartford contends that because the Anderson decision made clear that Redskins players may claim workers compensation benefits in D.C., the Anderson decision means that D.C. rates "lawfully apply" to the policy, such that use of D.C. rates in calculating the final premium is both authorized and required by the "Final Premium" clause of the policy, quoted above. Hartford's position would require interpreting the policy to authorize that which its plain language does not.

The policy unequivocally states that the terms of the policy can only be changed through endorsement to the policy. Policy at 1. The terms of the policy included a classification of Redskins players and coaches as Virginia employees. Hartford unquestionably only issued an endorsement to reflect the jurisdictional change for the 1990-91 policy.[6] Thus, Hartford did not satisfy the requirements of the policy, namely an endorsement, for the 1988 and 1989 policy years. Because no endorsement was issued, and no other provision of the policy authorizes Hartford to make the change in question, Hartford cannot effect a change in the policy's terms and charge additional premiums for the 1988 and 1989 policy years.

[6] Hartford's argument that a letter from its counsel to Pro-Football's insurance agent constituted an effective endorsement is unpersuasive. Hartford Opp. Exh. A. Nowhere does the letter purport to be an endorsement, nor is it labelled as such. Moreover, the letter states that "endorsements are being prepared" for the 1990 policy, but is silent on endorsements for the 1988 and 1989 policies. Thus, the text of the letter wholly undercuts Hartford's contentions.

More importantly, however, the policy does not authorize Hartford to change the jurisdictional basis of the policy, through an endorsement or otherwise. The policy permits changes affecting premiums in a number of specified ways. First, the Information Pages to the policy make clear that the experience modifier may be changed through endorsement to the policy. Second, changes to the "business or work" classifications may be made through endorsement to the policy if the classifications in the policy do not properly describe an employer's "actual exposures." For example, if employees classified as office personnel in fact performed construction work, Hartford could reclassify those employees and assess the corresponding rates and premium basis by endorsement to the policy. It is evident, however, that the Classifications clause goes to the work classifications of the insured's employees, and not the jurisdictional basis of the rates assigned to those classifications.[7] Had the parties intended the clause to include geographic classifications as well as "business or work" classifications, presumably they would have included such language in an endorsement to the policy.

Similarly, the policy permits Hartford to conduct audits to determine the accuracy of the information provided by Pro-Football, prior to calculating the final premium. According to the express terms of the policy, final premium is then calculated using the actual, not the estimated, premium basis (i.e., payroll) and the proper

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[7] The endorsement issued for the 1990-91 policy provides further support for this position. The purpose of the endorsement was to change the rates from Virginia to D.C. To accomplish this objective, the endorsement does not change the classifications in the policy, but rather "is amended to change payroll" on the previously-designated classifications. Hartford Opp. Exh. A.

classifications and rates determined under the Classifications clause. Policy, Part Five, ¶ E. In other words, the Final Premium clause means that final premium equals final classifications and rates, as determined under the Classification clause (which require an endorsement to change) multiplied by the actual premium basis, as determined under the Audit clause.

Hartford would stretch the interpretation of this Final Premium clause to authorize applying a different jurisdiction's rates to the policy, if those rates "lawfully apply." However, such an interpretation conflicts with the express policy provisions setting forth the basis for calculating final premiums, as described above, as well as the general provision requiring changes in the terms of the policy to be made through an endorsement.

Moreover, the Court agrees with Pro-Football that nothing in the Anderson decision mandated Hartford to retroactively switch the jurisdictional basis of its policies. Anderson held that Redskins players who play at RFK Memorial Stadium may collect D.C. workers compensation benefits if they are injured in the course of employment. Certainly the Anderson decision constitutes an important factor that Hartford and other insurers, as well as a state's WCIP, should take into consideration in determining the appropriate jurisdiction and premiums for a workers compensation insurance policy.[8] But the decision cannot be read as mandating a retroactive change in the jurisdiction of the premiums, particularly in light of the

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[8] In this regard, it is interesting that Hartford continued to agree to classify Redskins players and coaches as Virginia employees even after the D.C. Department of Employment Services rendered its decision holding that Redskins players were eligible for D.C. workers compensation benefits.

absence of an express provision in the contract addressing such a potential change.[9]

Finally, Hartford argues that the insurance policy must be interpreted in light of policy considerations, namely to discourage employers like Pro-Football from paying artificially low workers compensation premiums by claiming its employees are based in a cheaper state, and thereby obtaining a windfall to the detriment of other employers in the WCIP. As a policy matter, Hartford may well be correct. However, the express language of the insurance policy at issue in this case does not permit Hartford to take the action it contends would fulfill these policy objectives.[10]

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[9] Nor has Hartford offered evidence that either the Virginia or D.C. WCIP, or NCCI, directed Hartford to change the jurisdictional basis of the policy in light of Anderson. If they had, arguably this would constitute a change "authorized by law or a governmental agency regulating this insurance," Policy, Part Five, ¶ A, such that Hartford would be justified in charging different rates.

[10] In support of its policy arguments, Hartford submitted the affidavit of Robert Willis, the former Commissioner of Insurance for the District of Columbia. Pro-Football objected to the Willis affidavit, but countered with the affidavit of Ronald Herzfeld, a former NCCI employee. Hartford moved to strike the Herzfeld affidavit, contending that Pro-Football had failed to disclose Herzfeld and make him available for an expert deposition, as required by the Federal Rules of Civil Procedure.

Because both sides utilized expert affidavits in the pending motions without disclosing such experts and offering such experts for deposition during the time for discovery in this case, both affidavits are stricken, and neither was considered in connection with this Memorandum Opinion and Order. The Court specifically noted in her September 26, 1995 Order that all discovery closed on October 17, 1995. The parties were obligated to seek leave of Court prior to obtaining additional discovery, including expert testimony, after that time. They did not.

For the foregoing reasons, the Court concludes that the insurance policies in question do not permit Hartford unilaterally and retroactively to switch the jurisdictional basis of the policies. If Hartford was concerned about the impact of players obtaining D.C. workers compensation benefits, its recourse was through an experience modifier, if authorized and appropriate, or through modifying the jurisdictional basis of the policy when the policies were renewed.[11] But having agreed at the outset that classification of the players as Virginia employees was appropriate, Hartford cannot revisit that issue in the manner at issue here. Judgment in Pro-Football's favor on the complaint is therefore appropriate.

B. Motion To Dismiss

In viewing a motion to dismiss, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his [or her] claim which would entitle him [or her] to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Kenneda v. United States, 880 F.2d 1439, 1422 (D.C. Cir. 1989). The factual allegations of the complaint must be presumed true and liberally construed in favor of plaintiff. Zoelsch v. Arthur Anderson & Co., 824 F.2d 27, 33 (D.C. Cir. 1987); Shear v. National Rifle Ass'n of Am., 606 F.2d 1251, 1253 (D.C. Cir. 1979); see also 5A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure, § 1357, at 304 (1990). The plaintiff is entitled to all favorable inferences which may be drawn from those allegations. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

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[11] Of course, both parties could have mutually agreed to change the jurisdictional basis and modified their contract accordingly.

Following the Court's denial of Pro-Football's initial motion to dismiss, Pro-Football filed its answer and an eight-count counterclaim. The counterclaim brings claims for fraud, negligent misrepresentation, breach of fiduciary duty, bad faith, and breach of contract, as well as a request for declaratory judgment regarding, inter alia, the proper classification of Redskins employees.

1. Breach of Contract and Tort Claims

The breach of contract and tort claims stem from Pro-Football's allegations that Hartford had a conflict of interest while representing Pro-Football in the Anderson litigation. According to Pro-Football, Hartford knew that if Anderson was decided against Pro-Football, i.e., that players were found to be eligible for D.C. workers compensation benefits, Hartford would retroactively seek D.C. premiums from Pro-Football for 1988-91. This would translate into much higher fees for Hartford, because the fee percentage for the WCIP in the District of Columbia is substantially higher than Virginia, as are the premiums to which the percentage is applied. Thus, according to Pro-Football, Hartford stood to gain financially from an adverse decision in Anderson, and Hartford failed to disclose this alleged conflict of interest to Pro-Football.

Hartford makes a number of arguments in support of its motion to dismiss the counterclaims, but the Court need consider only one of Hartford's arguments because it is dispositive. Hartford argues that Pro-Football's counterclaims are barred by the District of Columbia's three-year statute of limitations on tort and contract claims. The Court agrees.

Pro-Football's tort and contract claims accrued no later than the spring of 1991, after Anderson was decided

against Pro-Football and Hartford notified Pro-Football that it was reclassifying the Redskins' players and coaches as District of Columbia employees for all three policy years and demanding millions of dollars in additional premiums. By this time, both the alleged breach of the insurance contract as well as the injury to Pro-Football had occurred, and the statute of limitations began to run.

Hartford and Pro-Football entered into a tolling agreement to toll the statute of limitations on "an[y] action in connection with the unpaid premiums." The agreement extended the statute of limitations until October 22, 1994 for such actions. Hartford filed its complaint on October 20, 1994. Pro-Football filed its counterclaims on October 10, 1995, well past the October 22, 1994 deadline contained in the tolling agreement and well outside the applicable statute of limitations had there not been a tolling agreement.

Pro-Football argues that its claims are timely because Hartford's complaint tolls the statute of limitations on compulsory counterclaims. While tolling may be the majority approach, see Federal Practice and Procedure: Civil 2d § 1419, the issue is determined by reference to state law in diversity actions. Id.; see also Kuwait Airways Corp. v. American Security Bank, N.A., 890 F.2d 456, 460 (D.C. Cir. 1989) (court sitting in diversity looks to local law for applicable statute of limitations). In the District of Columbia, "affirmative claims made by way of setoffs and counterclaims must be tested by the statute of limitations" in determining whether the claim is time barred. Sears, Roebuck and Co. v. Goudie, 290 A.2d 826, 830 (D.C.), cert. denied, 409 U.S. 1049 (1972).[12]

[12] De Vito v. Hoffman, 199 F.2d 468 (D.C. Cir. 1952), cited by Pro-Football for the opposite conclusion, predates Goudie by 20 years and is not controlling here.

Pro-Football argues that Goudie does not control this case, contending that the case does not expressly address the question of whether a complaint tolls the statute of limitations for compulsory counterclaims. However, the Goudie court's determination that the complaint does not toll counterclaims (except for recoupment claims) is implicit, in that the counterclaim at issue in Goudie would plainly have been timely had the statute of limitations been tolled by the complaint.

Thus, testing the counterclaim against the three-year statute of limitations, as Goudie directs, it is evident that Pro-Football's counterclaims are time barred. The counterclaims were filed on October 10, 1995; the statute of limitations, pursuant to the tolling agreement, expired on October 22, 1994. Accordingly, the statute of limitations bars Pro-Football's claims.

Pro-Football argues that this result is inconsistent with the Federal Rules of Civil Procedure, under which an answer and counterclaim need not be filed until 10 days after a court rules on a motion to dismiss brought under Rule 12. No doubt Pro-Football's actions in this case comported with the procedural requirements set forth in the Federal Rules. However, the Federal Rules are procedural in nature -- they do not supersede or alter the substantive statute of limitations applicable to a claim. Nor do the Federal Rules "offer any solution to the problem of whether the institution of an action tolls the running of the limitations period on compulsory counterclaims or reflect any federal policy on the question." Federal Practice and Procedure: Civil 2d § 1419. Consequently, the Federal Rules do not save Pro-Football's claims.

2. Declaratory Judgment Claim

Count VIII of the counterclaim seeks a declaratory judgment that (1) for purposes of the workers compensation insurance policy, Redskins players should be classified as Virginia employees; (2) that Anderson does not require or permit Hartford to reclassify Redskins players retroactively for purposes of determining premiums; and (3) that D.C. Code § 36-303(a-3), which exempts temporary or intermittent employees from D.C.'s workers compensation law, exempts Redskins players from eligibility for D.C. workers compensation benefits. This declaratory relief is neither appropriate nor warranted.

At the outset, the Court does not find declaratory relief is appropriate with regard to the interpretation of D.C.'s workers compensation statute. Such relief would be in the form of an advisory opinion, given the lack of a concrete workers compensation claim upon which the decision would be based. See Adv. Comm. notes to Fed. R. Civ. P. 57; see also Federal Practice and Procedure: Civil 2d § 2757. Parties highly interested in the declaration sought, namely the Redskins players, are not part of this action. Id. Moreover, under the workers compensation statute, it is the province of the Mayor, through the Department of Employment Services, and the District of Columbia Court of Appeals to determine the eligibility of workers to D.C. workers compensation benefits. D.C. Code §§ 36-320 & 322. Whether or not Redskins players fall within the statutory exception for temporary or intermittent employees is a question that these officials have the authority to decide, and will not be decided by this Court in a case involving interpretation of a workers compensation insurance policy.

Nor is the proper classification of Redskins players an appropriate subject for declaratory relief. This case asked the Court to determine whether a contract entered into by the parties permitted retroactive reclassification by one party. The Court has determined, supra, that under the contract, Hartford could not retroactively reclassify these players as D.C. employees for the policy years 1988-91. Whether it is appropriate for Hartford, or some other insurer, to classify the players as D.C. or Virginia employees as a general matter is an entirely separate issue from the contract question and the record before this Court. Declaratory relief on this issue is not appropriate.[13] Similarly, the Court has ruled that Anderson did not require or authorize Hartford to retroactively reclassify Redskins players as D.C. employees under the terms of the policy presented to the Court. This is not the forum or the case for further elaboration on Anderson's effect on other workers compensation matters.

For the foregoing reasons, Pro-Football's request for declaratory relief is denied.

III. CONCLUSION

For the reasons set forth above, it is

ORDERED that Hartford's Motion for Partial Summary Judgment as to Liability is denied; it is

FURTHER ORDERED that Pro-Football's Motion for Summary Judgment is granted as to the complaint; and it is

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[13] Here too, parties interested in the issue, namely the District of Columbia and Virginia workers compensation administrators, are not part of this action. For this additional reason, declaratory relief is inappropriate.

FURTHER ORDERED that Hartford's Motion to Dismiss Pro-Football's counterclaims is granted.

IT IS SO ORDERED.

August 21, 1996

Joyce Hens Green /s/

JOYCE HENS GREEN
United States District Judge

UNITED STATES COURT OF APPEALS FOR DISTRICT OF COLUMBIA CIRCUIT

FILED DEC 10 1997

CLERK

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 96-7215 **September Term**, 1997 - 94cv02266

HARTFORD ACCIDENT & INDEMNITY COMPANY,

Appellant

V.

PRO-FOOTBALL, INC., D/B/A
WASHINGTON REDSKINS,

Appellee

Consolidated with No. 96-7222

Before: Wald, Williams and Ginsburg, *Circuit Judges.*

ORDER

Upon consideration of the petition for rehearing of appellee/cross-appellant filed November 26, 1997, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: Robert A. Bonner /s/
Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS FOR DISTRICT OF COLUMBIA CIRCUIT

FILED DEC 10 1997

CLERK

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 96-7215 **September Term**, 1997 - 94cv02266

HARTFORD ACCIDENT & INDEMNITY COMPANY,
Appellant

V.

PRO-FOOTBALL, INC., D/B/A
WASHINGTON REDSKINS,
Appellee

Consolidated with No. 96-7222

Before: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges.

ORDER

Upon consideration of appellee/cross-appellant's Suggestion for Rehearing In Banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: Robert A. Bonner /s/
Robert A. Bonner
Deputy Clerk

STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 12(a)(1)(A):

> Unless a different time is prescribed in a statute of the United States, a defendant shall serve an answer (A) within 20 days after being served with the summons and complaint . . . .

Federal Rule of Civil Procedure 12(a)(4)(A):

> Unless a different time is fixed by court order, the service of a motion permitted under this rule alters these periods of time as follows: (A) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action . . . .

Federal Rule of Civil Procedure 13(a):

> A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's

> claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. . . .

Federal Rule of Civil Procedure 56(a):

> A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

Federal Rule of Civil Procedure 56(c):

> The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary

judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.